Supreme Court, U.S.
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No. 04-402

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY CARL IVES,

Petitioner,

v.

BOBBY BOONE, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was trial counsel for Petitioner laboring under an actual conflict of interest which prevented him from calling a critical defense witness? Was trial counsel otherwise ineffective for calling this witness to establish Petitioner's defense at trial?

Did expert testimony vouching for the overall credibility of the alleged victim render Petitioner's trial fundamentally unfair and deny him due process?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit affirming the denial of habeas corpus relief is not reported. *Ives v. Boone*, No. 02-6397 (10th Cir. May 3, amended June 7, 2004). (Appendix A) The order of the United States Court of Appeals for the Tenth Circuit denying Mr. Ives' petition for rehearing and suggestion for rehearing *en banc* is likewise not reported. (Appendix B) The order was issued on June 7, 2004.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. section 2253.

The Tenth Circuit's opinion was rendered on May 3, 2004. The Tenth Circuit denied Mr. Ives' petition for rehearing and suggestion for rehearing *en banc* on June 7, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall ... deprive any person of life, liberty, or property[] without due process of law... ."

28 U.S.C. section 2254(d)(1)(2) states in pertinent part that habeas relief is not available to a state prisoner unless the

state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

STATEMENT OF THE CASE/STATEMENT OF FACTS

Petitioner was convicted in state court (*State v. Ives,* Oklahoma County Case No. CRF-89-4544) of first degree rape and incest. He was sentenced to 40 years on the rape count and 80 years on the incest count. The state court jury acquitted him of a third count, sodomy. On direct appeal to the Oklahoma Court of Criminal Appeals, Mr. Ives' rape conviction was vacated with instructions to dismiss on double jeopardy/double punishment grounds because it duplicated the incest conviction. *Ives v. State,* No. F-90-870 (Okl. Cr. Mar. 11, 1994)(unpublished).

Petitioner sought state post-conviction relief on a number of grounds. The state trial court denied relief, *Ives v. State,* No. CRF-89-4544 (Dist. Ct. Okla. Co. May 14, 1997)(unpublished), and the Court of Criminal Appeals affirmed. *Ives v. State,* No. PC-97-704 (Okl. Cr. Jan. 30, 1998)(unpublished). No evidentiary hearing was conducted.

Mr. Ives filed a petition for writ of habeas corpus. *Ives v. Boone,* W.D. Okl. D.C. CIV-98-363-A. An evidentiary hearing was ultimately held on Petitioner's ineffective assistance of trial counsel claim. Relief on all claims was ultimately denied on October 7, 2002.

The District Court granted Mr. Ives a certificate of appealability on five issues, two of which are raised in this petition for writ of certiorari. On appeal to the United States Court of Appeals for the Tenth Circuit, that court affirmed the district court's denial of habeas relief in an unpublished opinion. *Ives v. Boone,* No. 02-6397 (May 3, 2004 , amended June 7, 2004)(Appendix A). The Tenth Circuit denied Mr. Ives' petition for rehearing and suggestion for rehearing *en banc* on June 7, 2004. (Appendix B)

Mr. Ives has steadfastly maintained his innocence. His alleged daughter, Wendy Ives, claimed that beginning in 1986 – and perhaps even 1985 – she was sexually abused and subjected to sexual intercourse by Petitioner approximately five to ten times per month. The abuse allegedly ended in 1989. No specific date or dates were ever given for these literally hundreds of claimed acts of abuse. No physical evidence supported her claims.

Wendy Ives had initially accused Petitioner of sexually abusing her in 1987, but recanted those allegations. Wendy Ives had falsely accused another man of raping or sexually molesting her in 1984.

Petitioner, who at one time was married to Wendy's mother, Laura Wilson, lived in a separate residence, was never around Wendy alone after he was falsely accused in 1987, and never had the opportunity to have visited this supposed nightmare of continual abuse on his purported daughter. Wendy claimed that Petitioner would climb on top of her to have sexual intercourse, but due to a gunshot wound to his arm, this was a physical impossibility during a significant period of time covered by the accusations. During the time of the false 1987 allegations and continuing for the next two years, Wendy

denied to her mother that Mr. Ives had been sexually inappropriate with her in any way.

Wendy Ives was an extremely disturbed youngster whose behavioral problems began at an early age. She was manipulative, dishonest, defiant of all authority, and had a host of severe mental impairments. She had been expelled from school for behavioral problems and drug use.

Wendy admitted in both juvenile court proceedings which alleged she was a deprived child due to Petitioner's alleged acts of abuse and Petitioner's criminal trial that she had a motive to fabricate her accusations due to a litany of grievances she held against Mr. Ives, none of which related to sexual abuse. She did not like the rules Petitioner imposed when he was in her presence, and she found him too strict. Wendy resented Mr. Ives, argued with him, and thought she would have an easier time with him "out of the way" so she could push her mother around. She was resentful because Petitioner, who was supposedly her father, did not enter her life until she was 13 years old.

To buttress Wendy's uncorroborated – and largely physically impossible – accusations, the prosecution relied on supposed "expert" witnesses who did not hesitate to vouch for her credibility, labeling her "sincere" and "believable". One, a Dr. Calenzani, even flatly declared to the jury that Wendy was the victim of incest.

Mr. Ives testified and denied all the charges, as he has from the beginning and continues to do to this day. Unfortunately for him, the one witness who could testify in detail that Wendy's accusations were false was not called at trial. This witness was Petitioner's then wife, Laura Wilson. Laura had testified at length at an earlier juvenile court trial

where it was alleged that because of Petitioner's sexual abuse, Wendy was a deprived child. The juvenile proceedings preceded the criminal charges against Mr. Ives. Laura Wilson was jettisoned as a trial witness at the eleventh hour, despite the fact the jury was told repeatedly by trial counsel that she would testify, and even though Mr. Ives had been assured up to the last minute by his lawyer that she would be called. No valid strategic reason was behind the decision not to call Ms. Wilson. Rather, defense counsel kept her off the stand because he had an actual conflict of interest: Laura Wilson was the client of his law partner, and her interests, by the time of trial, diverged from Petitioner's.

REASONS FOR GRANTING THE WRIT

Petitioner was denied his Sixth and Fourteenth Amendment rights to conflict free counsel and effective assistance of counsel. The ruling of the state court, as supported by the Tenth Circuit was contrary to, or an unreasonable application of, the precedent of this Court. 28 U.S.C. section 2254(d)(1).

Mr. Ives was denied his Fourteenth Amendment due process rights to a fair trial. Expert testimony improperly vouched for the credibility of the victim. Where the alleged victim was the key witness at trial, the admission of this critical "corroborating" evidence rendered the trial fundamentally unfair. The ruling of the state court, as affirmed by the Tenth Circuit, was contrary to, or an unreasonable application of previous decisions of this Court affirming the due process right to a fair trial.

ARGUMENT
I.

PETITIONER'S TRIAL COUNSEL, DUE TO AN ACTUAL CONFLICT OF INTEREST, ABANDONED A LEGITIMATE DEFENSE STRATEGY. EVEN ABSENT A CONFLICT OF INTEREST, TRIAL COUNSEL WAS INEFFECTIVE.

Laura Wilson, Petitioner's wife, was a critical defense witness. Ms. Wilson testified at the deprived child hearing, and contradicted the victim's account of abuse. Ms. Wilson testified Mr. Ives could not have assaulted her daughter Wendy with the frequency she described, since Petitioner maintained a separate home and did not want to be near Wendy after she falsely accused him of molesting her in 1987. These 1987 allegations were later recanted by Wendy Ives. Mr. Ives had physical difficulties from a gunshot wound during the relevant time that made it difficult if not impossible for him to assaulted Wendy in the manner she described. Ms. Wilson described her daughter as resentful of Petitioner for reasons other than the claimed assaults. She was frequently dishonest and manipulative, and had suffered significant emotional problems since early childhood. For a period of years, the victim denied the charges she had leveled at Mr. Ives. Ms. Wilson stated that there was an absence of physical evidence to support the charges. For example, she never noticed suspicious stains on her daughter's clothing. Ms. Wilson did not believe the charges, and refuted them in her testimony at the juvenile court proceeding.

Ms. Wilson was not called as a defense witness at trial -- even though counsel assured the jury in voir dire and opening statement that she would be a witness. Although unconvincingly denied, trial counsel labored under a conflict of

interest. His law partner represented Laura Wilson in the ongoing deprived child proceedings. One of the reasons counsel was hired to represent Mr. Ives was that he was told by trial counsel that it would be advantageous to the defense to have him represent Mr. Ives because Ms. Wilson was represented by a lawyer in the same firm. This arrangement of "cooperation" apparently soured when Laura decided she did not believe Mr. Ives anymore and cut off contact with trial counsel.

Laura Wilson was not called as a trial witness, to Mr. Ives' prejudice, because trial counsel represented actual conflicting interests and this conflict led him to leave her off the witness stand. Calling her as a defense witness might imperil her case in the deprived child action, a case where she was represented by trial counsel's partner.

The Tenth Circuit credited testimony from the evidentiary hearing from trial counsel and his then partner that: 1) calling Laura Ives would not have affected her child custody action, and she was not subject to criminal charges, so, therefore, trial counsel was not protecting her to his own client's detriment; and 2) that counsel made a reasoned strategic decision to leave Laura Wilson off the stand when her attitude turned against Petitioner. *Ives v. Boone,* No. 02-6397 (10th Cir. May 3, 2004, amended June 7, 2004, slip. op. at 8-11)

The record says much more than that. The record of the evidentiary hearing in the federal district court is replete with testimony to the effect that Laura Wilson's *continued support* of Mr. Ives would adversely affect her chances of regaining custody of her daughter from the state. This testimony contradicts the factual scenario presented by the Tenth Circuit. Since Ms. Wilson's continued support of Mr. Ives would or could impact negatively on her case, and she evidently "turned"

for this reason, trial counsel and his partner were representing direct conflicting interests by the time of Mr. Ives' criminal trial. The Tenth Circuit's finding that counsel was not saddled with conflicting loyalties is predicated on the "fact" that, had trial counsel actually called Laura Wilson as a witness, there would be no conflict because *she did not support her husband any longer and would give testimony adverse to his interests, not hers. Id.*

The Tenth Circuit has it backwards. The fact that Laura Wilson evidently changed her mind and was no longer supporting Petitioner is the quintessence of conflict, where each were represented by members of the same firm, and where each client's interests had diverged at the time of Petitioner's criminal trial. Although Laura Wilson turning against her husband and attempting to recant at Petitioner's criminal trial may have eased her problems in the juvenile proceeding, this position was in direct conflict with Petitioner's interests, which was to have Laura Wilson repeat at his criminal trial her earlier sworn testimony repudiating her daughter's accusations. If Laura Wilson's interests at the time of Mr. Ives' criminal trial were truly adverse to his, then two lawyers in the same firm were representing clients with diametrically opposed interests, an obvious conflict.

The Tenth Circuit overlooks another fact: testimony at Petitioner's trial by Laura Wilson recanting her earlier, under oath testimony debunking the accusations of her daughter would have subjected her to a possible perjury charge. 21 Okla. Stat. section 496 (diametrically opposed testimony on material matters constitutes perjury). Contrary to the analysis of the Tenth Circuit, Laura Ives' penal and other interests would have been adversely affected had she given trial testimony which was consistent with her earlier testimony exonerating her husband.

The conflict in this case could not be more apparent or actual. *Wood v. Georgia,* 450 U.S. 261, 271 (1981). Lawyers from the same firm represented two parties with divergent interests simultaneously. The existence of divergent interests between Petitioner and Laura Wilson explains in large part why Wilson would alter earlier testimony she gave under oath -- to protect herself. Mr. Ives' trial counsel believed he could not call Ms. Wilson because of her adverse interest, as his testimony at the evidentiary hearing demonstrated. Because Wilson no longer supported Petitioner, counsel believed she would not longer give testimony favorable to him. For the Tenth Circuit to claim that Ms. Wilson's future legal interests had nothing to do with keeping her off the stand is to ignore reality, and pertinent portions of the record.

Because Mr. Ives was denied his Sixth and Fourteenth Amendment rights to conflict free counsel, and a conflicting legal interest affected a change of stories by a key defense witness, a conflict which drove counsel's decision not to call Laura Wilson, Mr. Ives this Court should grant *certiorari* and Petitioner is entitled to habeas relief. There was an actual conflict of interest which prejudiced Petitioner and adversely affected his representation. Due to the conflict, a legitimate line of defense was abandoned. *Mickens v. Taylor,* 122 S.Ct. 1237, 1243-44 (2002); *United States v. Cronic,* 466 U.S. 648 (1984); *Cuyler v. Sullivan,* 446 U.S. 335, 350 (1980). The state court ruling, as supported by the Tenth Circuit, was contrary to or an unreasonable application of this Court's decisions. 28 U.S.C. section 2254(d)(1).

Even aside from the conflict of interest issue, *certiorari* should be granted because trial counsel was ineffective under the two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984) for failing to call Laura Wilson as a witness. The Tenth

Circuit found the failure to call Wilson was a reasonable strategy because she had changed her view of Petitioner and was no longer supporting him. *Ives v. Boone,* No. 02-6397 (10th Cir. May 3, 2004, amended June 7, 2004, slip. op. at 10-14)(unpublished). Overlooked by the Tenth Circuit was trial counsel's testimony at the evidentiary hearing that even if Ms. Wilson had switched sides and was hostile to Petitioner at the time of his trial, it still would have been a legitimate strategy to call her as a witness. Trial counsel also acknowledged that based on her previous testimony, Laura Wilson refuted the charges against Petitioner. Despite her changed attitude, Wilson was already on record under oath; any change in her account could have been powerfully impeached by her earlier testimony. Moreover, the motive for any change in testimony was obvious: as long as she supported her husband, her chances of regaining custody of her daughter decreased or would have been eliminated altogether, as even trial counsel and his partner admitted at the evidentiary hearing. This motive for changing course could have been pointed out to the jury as a means of convincing them that Wilson's earlier account was the truthful one and that Wendy Ives' unsupported story was false, according to sworn testimony that had been given by her own mother.

Changed attitude or not, trial counsel's decision not to call Laura Wilson was not a sound trial strategy.[1] Based on her

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[1] Testimony from Petitioner and others at the evidentiary hearing calls into question the Tenth Circuit's conclusion that trial counsel's decision not to call Laura Wilson was a considered trial strategy. It appears to have been made on the spur of the moment, and without consultation with Petitioner. Petitioner testified at the evidentiary hearing that in light of his prior convictions, the only reason he decided to testify was

previous testimony exonerating Mr. Ives, it was professionally unreasonable to leave her off the witness stand. Wendy Ives accusations against Petitioner -- except for improper expert testimony (see below) -- were unsupported by any corroborating evidence. She had earlier recanted similar accusations. No physical evidence supported her claims. She had a history of emotional problems. She resented Mr. Ives for reasons unconnected to her allegations o f a buse. The case came down to a swearing match between the alleged victim and Petitioner. Petitioner's credibility was subject to attack because he had previous felony convictions. In the context of a weak prosecution case, it was simply professionally unreasonable not to call the one witness who could refute, whether through impeachment or not, and who earlier had refuted, Wendy Ives' claims.

Because the prosecution case was weak, relying almost exclusively on the accusatory testimony of a troubled young girl, there is a reasonable probability that had Laura Wilson been called as a witness, the outcome would have been different. This Court has not hesitated to grant relief where counsel, without a legitimate strategy, fails to produce important and available evidence which could have made a difference in the outcome. *E.g., Wiggins v. Smith,* 539 U.S. 510 (2003); *Williams v. Taylor,* 529 U.S. 362 (2000). The same should hold true for Petitioner. The state court's decision

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because trial counsel assured him Laura Wilson would be called as a witness. Trial counsel told the jury she would be called. Petitioner's family, as well as an expert witness retained by the defense, testified at the evidentiary hearing that up until the last moment, they expected Laura Wilson to be a witness. None of this testimony is mentioned in the Tenth Circuit opinion.

to the contrary, as affirmed by the Tenth Circuit, failed to correctly apply Supreme Court holdings addressing the test for ineffective assistance of counsel. *Strickland v. Washington,* 466 U.S. 668, 684 (1984); 28 U.S.C. section 2254(d)(1).

II.
PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY "EXPERT" TESTIMONY VOUCHING FOR THE ALLEGED VICTIM'S CREDIBILITY.

The lower courts have ruled consistently that testimony from expert witnesses vouching for the credibility of victim/witnesses, particularly in sexual assault or abuse cases, is improper and can deny the Fifth Amendment or Fourteenth Amendment due process right to a fair trial. *E.g., United States v. Charley,* 189 F.3d 1251, 1264, 1267, 1270 (10th Cir. 1999); *Snowden v. Singleterry,* 135 F.3d 732, 738 (11th Cir. 1998); *United States v. Shay,* 57 F.3d 126, 131 (1st Cir. 1995); *Mauer v. Minnesota Department of Corrections,* 32 F.3d 1286, 1290-91 (8th Cir. 1994); *United States v. Whitted,* 11 F.3d 782, 785-86, 787 (8th Cir. 1993). Because expert testimony of this type is inadmissible, it obviously cannot pass muster under this Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) for the admissibility of expert testimony. Various opinions from this Court make it clear that the accused in a criminal case has a due process right to a fair trial, a right that can be denied, for example, by improperly admitted testimony. *E.g., Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974); *Bruton v. United States,* 391 U.S. 123, 131 n. 6 (1968); *Spears v. Mullin,* 343 F.3d 1215, 1226-30 (10th Cir. 2003)(vacating death sentence on due process grounds due to improper admission of unfairly prejudicial evidence).

The Tenth Circuit held that the expert testimony of prosecution witnesses Drs. Worley and Calenzani did not

"vouch" for the overall credibility of the alleged victim's accusations because any such testimony given by these witnesses went largely to the "sincerity" of Wendy Ives' alleged previous suicide attempts, not her testimony as a whole. The Tenth Circuit also concluded that any improper opinion testimony from these witnesses was invited on cross examination. *Ives v. Boone,* No. 02-6397 (10th Cir. May 3, 2004, slip op. at 15-19, amended June 7, 2004)(unpublished).

The Tenth Circuit was wrong on both counts. The experts gave testimony generally vouching for the accuser's testimony as a whole. The testimony was not invited. The fact counsel tested on cross-examination the validity of the opinions arrived at by the expert witnesses does not "invite" incompetent and groundless "expert" testimony.

On cross-examination, Dr. Worley was asked if she relied on truthful, accurate information in making a diagnosis. She stated she relied on her patients. When the question was repeated, Worley stated that she could diagnose a patient based on what she was told, but could not attest to its accuracy. When asked a general question if a diagnosis would be valid if based on inaccurate information, Worley reversed field, declaring: "[i]n my experience I have -- in my experience you can tell when somebody is telling the truth. In my medical opinion, she was sincere when I saw her." This goes far beyond an opinion regarding the "sincerity" of a suicide attempt. Worley examined the alleged victim in connection with her allegations of sexual abuse, not merely with respect to any suicide attempts. This general vouching testimony was not invited by counsel's question, since he merely asked the witness if a diagnosis would be invalid if based on inaccurate information.

The same is even more true of Dr. Calenzani's testimony. He vouched for the credibility of the accuser's charges as a whole. When asked on cross-examination if he agreed with a defense expert that Wendy Ives suffered from disordered thinking and was not in good contact with reality, Dr. Calenzani went beyond what called for a yes or no answer to opine: "I think she was in full contact with reality. I think that all of the information she gave me there was a reason it was given. It was a time of enormous turmoil and I fully believe her. That is why I believe." Calenzani told the jury the alleged victim "never lost control" of reality, "accurately related" the things she observed, and that her recantation of previous, similar accusations against Petitioner stemmed not from the fact that she was fabricating, but was motivated by a desire to "protect a parent." Unmentioned in the Tenth Circuit opinion is that Dr. Calenzani told the jury outright Mr. Ives was guilty. He told the jury: "Wendy is the victim of incest."

The vouching testimony of these witnesses not only violated due process and failed to pass muster under *Daubert*. It also runs afoul of this Court's decision in *Tome v. United States*, 513 U.S. 150 (1993). In *Tome*, this Court criticized the use of expert witnesses to in effect relate hearsay statements from their patients, particularly where, as here, the patient or third party has a reason to fabricate. The experts in this case went beyond relating hearsay statements to putting a seal of approval on the truth of the accusations.

This vouching testimony, not accurately described by the Tenth Circuit, rendered Mr. Ives trial fundamentally unfair in violation of due process. *Brecht v. Abramson*, 507 U.S. 619 (1993). The state's case for conviction rested on Wendy Ives testimony. There was no independent corroboration, no physical evidence, and due to her history of past recanted accusations and numerous other factors, the alleged victim was

subject to impeachment. The improper expert testimony in this case lent critical, indispensable support to the shaky credibility of the accusing witness, and could very well have turned the *tide for conviction, transforming a swearing match into a case* where the credibility of the accuser was supported by the authoritative pronouncements of "experts." Accordingly, this Court should grant *certiorari*. The state court decision approved by the Tenth Circuit was contrary to or an unreasonable application of Supreme Court precedent enforcing the due process right to a fair trial. *E.g., Williams v. Taylor,* 529 U.S. 362 (2000); 28 U.S.C. section 2254(d)(1).

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests this Court grant review of this matter.

Respectfully submitted,

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